COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

RE: INCREASING THE PENETRATION RATE FOR DISCOUNTED ELECTRIC, GAS AND TELEPHONE SERVICE **DTE 01-106**

RESPONSE OF THE MASSACHUSETTS COMMUNITY ACTION PROGRAM DIRECTORS ASSOCIATION AND THE MASSACHUSETTS ENERGY DIRECTORS ASSOCIATION TO JUNE 19, 2003 BRIEFING QUESTION

June 27, 2003

I. INTRODUCTION

On April 29, 2003, the Department of Telecommunications and Energy ("Department") held a meeting on the Department's Notice of Inquiry for increasing the enrollment rate for discounted electric, natural gas and telephone services. Memorandum from Michael Killion in DTE 01-106, June 19, 2003 ("June 19 Memo"). At the meeting, the Department proposed the use of a computer matching program with the Executive Office of Health and Human Services ("EOHHS") for the purpose of enrolling eligible customers in discount programs. June 19 Memo. The Department now seeks comment on "any legal impediment and legal justification for utility participation in a computer matching program with EOHHS that would involve the electronic transfer of all residential accounts to EOHHS for the sole purpose of identifying customers eligible for discounted service with subsequent destruction of non-matching data." *Id.*

The Massachusetts Community Action Program Directors Association and the Massachusetts Energy Directors Association (collectively, "MASSCAP") respectfully submit this analysis in response

to the Department's question.

II. MASSACHUSETTS LAW SPECIFICALLY AUTHORIZES USE OF THE MATCHING PROGRAM PROPOSED BY THE DEPARTMENT

The Department seeks comment on the legal justification for utility participation in a computer matching program with EOHHS. The legislature has specifically addressed the obligation of utilities to consider use of the very matching program that the Department has proposed:

> Each distribution company **shall** conduct substantial outreach efforts to make said low-income discount available to eligible customers . . . . Outreach may include establishing an automatic **program of matching customer accounts with lists of recipients of said means tested public benefits programs** and based on the results of said matching program, to presumptively offer a low-income discount rate to eligible customers so identified; provided, however, that the distribution company, within 60 days of said presumptive enrollment, informs any such low-income customer of said presumptive enrollment and all rights and obligations of a customer under said program, including the right to withdraw from said program without penalty.

G.L. c. 164, § 1F(4)(i)(emphasis added). Since the legislature, in the same section of the law, also "require[s]" the Department to ensure that utilities maintain "the low-income discount rate[s] in effect prior to March 1, 1998," there can be no question that the legislature has directed the Department to implement discount rate programs and granted it the authority to implement matching programs as an effective means for utilities to "conduct substantial outreach efforts." *Id.*

The Department's proposed computer matching program is precisely the type of automatic enrollment program authorized by the governing statute. The Department's computer match model first requires a utility to send an electronic file to EOHHS, containing the identifying information of its residential customers (e.g., name, address, social security number [if available], but not private customer usage data or payment information). EOHHS then runs this file through its computers to

match the customers from the incoming data file against EOHHS's client data bases. Finally, EOHHS reports back to the utility, identifying which of the utility's customers are eligible for a discounted utility rate due to participation in a means-tested benefits program administered by EOHHS. The matching would be done electronically by the EOHHS computers, and no person at EOHHS would view any of the incoming information. Additionally, EOHHS would physically destroy the utility's files once the list of matches was sent back to the utility to insure that no person at EOHHS could ever gain access to the files sent by the utility. It is inherent in the administration of such a matching program that there will be utility customers who are not eligible for the discounted benefits but whose names and identifying information will be included in the lists sent to EOHHS. However, no one's privacy will be violated. Tthere is no legal impediment to the Department proceeding with the matching program just described.

If someone were to challenge the proposed matching program in court, the court will first look at the governing statute (G.L. c. 164, § 1F) to determine whether the matching program was authorized under the statute. A court's primary function in interpreting a statute is to ascertain the intent of the legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced. *Buster v. George W. Moore, Inc.*, 438 Mass. 635, 645 (2003). Here, the governing statute explicitly authorizes the use of automatic enrollment for matching customer accounts with lists of recipients of means tested public benefits programs to presumptively offer discount rates. Other states have used similar matching programs to automatically enroll eligible households into discount rate programs (e.g., Texas and New York), and there have been no legal challenges of those programs.[1]

[1] In fact, MASSCAP has had conversations with individuals who are very familiar with implementation of the matching programs in both New York and Texas, and the experience so far is

Automatic enrollment through matching programs is generally seen as the single most effective tool for identifying and enrolling low-income households who are eligible for utility discounts. According to an analysis by the National Consumer Law Center, New York, which uses a computer match program similar to the one proposed by the Department, has the fifth highest penetration rate for telephone Lifeline discounts in the nation.[2] Texas, which also uses a computerized match program for its new electric discount program, enrolled 615,000 customers in the first eight months after the discount was offered.[3]

The need for the Department's proposed computer match program has been spelled out in great detail in the earlier comments of MASSCAP. To reiterate some key points, slightly less than one-third of eligible Massachusetts households are enrolled for electric and natural gas discounts.[4] The penetration rate for the telephone Lifeline/Link Up programs is also in the range of 30%, based on analysis by the National Consumer Law Center[5]. As was discussed in earlier comments, it is safe to

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that no party has vigorously argued that matching programs violate customers' rights to privacy. While interested parties in Texas and New York, as here in Massachusetts, have legitimately raised questions as to whether privacy rights would be violated, the relevant state agencies and key stakeholders (utility companies, low-income and consumer representatives, etc.) concluded that a properly designed and carefully implemented matching program would not violate privacy rights.

[2] See MASSCAP Comments, January 31, 2002, Attachment A.

[3] Public Utility Commission of Texas, "Report to the 78th Texas Legislature: Scope of Competition in Electric Markets in Texas," January 2003, at 74, available at http://www.puc.state.tx.us/electric/projects/25645/25645.cfm.

[4]"DOER Electric Discount Rate Outreach and Eligibility Report," available at www.state.ma.us/doer/pub_info/drr02.pdf.

[5]Comments of MASSCAP, January 31, 2002 at 2,12.

assume that tens of thousands of households who can readily be identified as income-eligible for discount utility rates have not yet enrolled. Comments of MASSCAP, January 31, 2002 at 7-18.

Courts and legislatures have long recognized that access to utility service is a basic necessity of life in modern society. *See, e.g., Memphis Light Gas & Water Division v. Craft*, 436 U.S. 1, 20 (1978)("the cessation of essential services for any appreciable time works a uniquely final deprivation"); St. 1997, ch. 164, § 1(a)("Electricity service is essential to the health and well-being of all residents of the commonwealth . . ."). The Department's proposed computer match program would be an effective tool in increasing the participation rate in discount programs, thus increasing the ability of low-income households to pay for basic, vital utility service.

III. THE DEPARTMENT'S PROPOSED COMPUTER MATCH PROGRAM WOULD NOT INVADE THE PRIVACY OF UTILITY CUSTOMERS

The Department also seeks comment on any legal impediment for utility participation in the proposed computer match program. At least one utility company has orally questioned whether the proposed computer matching program will violate protected rights. The law is clear that the program, as currently conceived, will not substantially violate any legally-protected privacy interests.

Massachusetts law provides:

> A person shall have a right against unreasonable, substantial or serious interference with his privacy. The superior court shall have jurisdiction in equity to enforce such right and in connection therewith to award damages.

G.L. c.214, §1B. Whether this law would be violated by the proposed matching program must be

considered from two perspectives: customers who receive public benefits administered by EOHHS and who will potentially benefit from the matching program, and those who do not receive any EOHHS-administered public benefits.

A. Customers who receive benefits administered by EOHHS will give permission to share data, and any privacy issues will therefore be moot

As discussed in earlier comments by MASSCAP,[6] the privacy rights of customers receiving EOHHS assistance can readily be addressed through the LIHEAP–utility model where applicants for LIHEAP sign a form giving permission to release information to utility companies for the purpose of enrollment in discount programs. The privacy waiver is part of the LIHEAP application and is voluntary. Applicants have the opportunity to decline granting permission for releasing information without affecting their application for LIHEAP assistance. In practice, MASSCAP is not aware of any individuals who refused to authorize release of information to utilities in recent years. MASSCAP understands that EOHHS is in the process of revising its application form to include a similar waiver, thus avoiding the privacy issue for recipients of EOHHS benefits. MASSCAP further understands that for all new applicants, the waiver language will be added to application forms; for all current recipients, language will be added to recertification forms.

The Attorney General noted in his comments that the LIHEAP-utility model "seems to have adequately addressed privacy concerns" because LIHEAP applicants have given explicit permission to share their personal information with utilities for the purpose of getting onto any available discount rates.[7]

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[6]Comments of MASSCAP, January 31, 2002, at 19-28; Reply Comments of MASSCAP, March 7, 2002, at 2-3; Additional Comments of MASSCAP, November 14, 2002, at 2-4.

[7] Comments of the Attorney General, January 24, 2002, at 7 - 9.

MASSCAP is not aware of any party in this docket voicing a contrary view.

B. For non-EOHHS clients, the proposed matching program does not pose any risk of an "unreasonable, substantial or serious interference" with the right to privacy.

As noted above, the Massachusetts Privacy Act, G.L. c. 214, § 1B, provides: "A person shall have a right against unreasonable, substantial or serious interference with his privacy." Thus, not every asserted interference with privacy is actionable under Massachusetts law. Rather, that interference must be "unreasonable, substantial or serious" before it would be deemed to violate state law. The federal district court, in interpreting the Massachusetts Privacy Act, has noted that not every disclosure of a non-public fact violates the Privacy Act; only "disclosure of facts about an individual that are of a *highly personal or intimate* nature" can form the basis for a Privacy Act claim. *French v. United Parcel Service*, 2 F.Supp.2d 128, 131 (D. Mass. 1998)(emphasis in original; citation omitted). *See also Tedeschi v. Reardon*, 5 F.Supp.2d 40, 46 (D. Mass. 1998)("To be actionable under G.L. c. 214, § 1B, an interference with the right to privacy must be unreasonable and either substantial or serious"); *accord, Ellis v. Safety Ins. Co.*, 41 Mass.App.Ct. 630, 637-638 (1996).

Under the Department's proposed match program, a utility sends its customers' identifying information electronically in a batch of data to computers at EOHHS. EOHHS computers then run the utility's list of customers against the EOHHS lists of benefits recipients for the sole and limited purpose of enrolling those low-income households onto discount utility rates. Under the Department's proposed program, once the matches are identified and the match list is electronically sent back to the utility, EOHHS would immediately destroy the utility file. No person will look at or review any individual's

data as the match is being set up and the only file that would remain is the list of matched customers that would be held by the utility. Given these facts, it is difficult to identify any interference with privacy that is either substantial, serious or unreasonable. To the extent there is any interference with privacy, it is certainly not substantial or serious, because reasonable protections will be in place to protect against disclosure to anyone at EOHHS. Further, no information will be disclosed by EOHHS to the utility companies regarding utility customers who do not receive EOHHS benefits, because EOHHS possesses no information regarding these non-recipients.

Assuming, *arguendo*, that some private information will be disclosed, disclsoure is not "unreasonable," within the meaning of the Privacy Act, because the Restructuring Act mandates that utility companies conduct "substantial outreach" and specifically includes electronic matching programs as a preferred outreach tool. G.L. c. 164, § 1F(4).

While there is no case law directly on point with the privacy concerns raised by the Department's proposal, it is important to recognize that courts in the employment context have balanced the interests of the individual against other legitimate and countervailing disclosure interests, rather than establishing a blanket rule that every conceivable disclosure of private information is illegal. *See, e.g., Dasey v. Anderson*, 304 F.3d 148, 153 (1st Cir. 2002)(actionable Privacy Act violation only where there is disclosure of personal or intimate facts and "there exists no legitimate, countervailing interest"); *accord, Bratt v. Int'l Bus. Mach. Corp*., 392 Mass. 508, 518 (1984).

The Department here has ample statutory authority to implement the proposed computer matching program. Use of an electronic matching program will facilitate the utilities' statutory obligation to perform outreach for the discounted utility rates. The record of comments filed in this case

demonstrates that by using a matching program and automatically enrolling those found eligible for the discounts, utilities will substantially increase the numbers of households enrolled in the discount rate programs mandated by G.L. c. 164, § 1F(4). Thus, there are very substantial and legitimate interests that support going ahead with the matching program, and only the most tenuous of arguments that there will be any interference with privacy rights.

It bears repeating that to fall under the protection of the Massachusetts privacy statute, disclosed facts must be of a "highly personal or intimate nature." *Wagner v. City of Holyoke*, 241 F.Supp.2d 78, 100 (D. Mass. 2003); *Bratt, supra*. The limited identifying information that will be shared between utility companies and EOHHS (and, significantly, only between their computers) does not clearly rise to the level of highly personal or intimate personal information, especially in the context of carrying out the worthy purpose of identifying households eligible for low-income discounts.[8] While case law on this point is still unsettled, courts of this Commonwealth have held that release of identifying information is not always actionable under G.L. c. 214, § 1B, especially in contexts where disclosure relates to a valid governmental function or purpose. *See, e.g., Pottle v. School Committee of Braintree*, 395 Mass. 861 (1985)(release of name, address and job classification of public school employees not protected by provision of Public Records law exempting information "disclosure of which may constitute an

[8] MASSCAP is not suggesting that minimal disclosure of identifying information, such as name and account number, would never violate the Privacy Act. To the contrary, MASSCAP believes that there would be serious privacy issues if disclosure of such information was purely gratuitous, or made to advance commercial interests, or intended for harassment. MASSCAP's arguments rely heavily on the facts that state law mandates "substantial outreach" by utilities; that matching programs are explicitly mentioned; and that discount programs carry out the important public purpose of making essential utility service more affordable for low-income households.

unwarranted invasion of personal privacy;" public employees have lesser expectation of privacy). The case of *Weld v. CVS Pharmacy*, 1999 WL 494114 (Mass. Super. Ct. 1999), *aff'd on other grounds sub nom. Weld v. Glaxo Wellcombe, Inc*. 434 Mass.81 (2001), which some might read as giving the broadest possible protection to personal information, does not undermine the conclusion that the Department's proposed program will not violate the Privacy Act. First, the trial court's decision is nothing more than a refusal to grant summary judgment to the defendants. Second, the court was addressing a program in which the defendant CVS screened its customer lists to identify customers with specific medical conditions for the sole benefit of pharmaceutical companies looking to market their products. Given the purely commercial interests which the defendant's use of private information advanced, it is not surprising that the court refused to grant summary judgement to the defendants.

MASSACAP concludes that the Department's proposed matching would not violate the privacy rights of either EOHHS clients who would be found eligible through the matching process or of utility customers who are not recipients of any EOHHS assistance.

IV. CONCLUSION

MASSCAP applauds the Department for its leadership in proposing an electronic matching program that will substantially increase penetration rates in utility discount programs. MASSCAP sees no legal impediment to the Department proceeding as it has proposed, and in fact finds direct legal authority for the matching program in G.L. c. 164, § 1F(4).

The Department has demonstrated its commitment to increasing participation in discount programs, thus increasing the ability of low-income households to pay for basic, vital utility service. MASSCAP thanks the Department for working diligently to improve the success of discount rate programs.

Respectfully submitted,

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